

the plaintiff at the time of bringing the suit has a right to the possession, he must succeed; or if he have it not \*his action must be defeated. **99** Whoever is entitled to the possession, whatever may be his title in other respects, may maintain or defeat the action of replevin,"<sup>4</sup> *Cumberland C. & I. Co. v. Tilghman*, 13 Md. 74; *Smith v. Williamson*, 1 H. & J. 147. But it is a general rule that the plaintiff must have a property, general or special, in the goods at the time of the taking, and in most cases the plaintiff, either from the circumstances of his case or the form of the pleadings, is obliged to prove as well his title as his right to possession, just as happens in an action of ejectment, and hence it is often with great propriety said that replevin lies to try the title to chattels, see *Bowie's Ex'r v. Bowie*, 1 Md. 87; *Cullum v. Bevans*, 6 H. & J. 469, replevin for a day-book and ledger; *Cromwell v. Owings*, 7 H. & J. 55; *Brooke v. Berry*, 1 Gill, 153. There are, however, two exceptions to the general rule that replevin lies in such cases, first: where the goods have been taken in a former replevin, and secondly: where the goods are in the custody of an officer of the law, *Cullum v. Bevans*; <sup>5</sup> *Cromwell v. Owings supra*; but the plaintiff in the first replevin

in issue and no evidence was offered by either party except that which tended to support his title. *Seldner v. Smith*, 40 Md. 602.

A judgment of a justice of the peace for plaintiff in replevin on a trial *ex parte* after two *non ests* legally vests in the plaintiff the right of possession in the property replevied and is sufficient to defeat an action of trover brought by defendant in the replevin suit against the plaintiff for conversion of the property. *Bryan, J. in Heinekamp v. Beaty*, 74 Md. 388, 394.

<sup>4</sup> *McGuire v. Benoit*, 33 Md. 181; *Lamotte v. Wisner*, 51 Md. 543; *Butler v. Gannon*, 53 Md. 333; *Rogers v. Roberts*, 58 Md. 519; *Crabbs v. Koontz*, 69 Md. 59; *B. & O. R. R. Co. v. Rueter*, 114 Md. 687.

**Parties.**—A surviving partner may replevy partnership property from the administrator of his deceased partner, without having declared as surviving partner; and in the same action he may recover also property to which he is individually entitled. *Smith v. Wood*, 31 Md. 293.

In replevin all the owners in common of the property should join as plaintiffs but the non-joinder cannot be taken advantage of except by a plea in abatement. *Brown v. Ravenscraft*, 88 Md. 216. Cf. *Cheney v. Eastern Line*, 59 Md. 557; *Waring v. Slingluff*, 63 Md. 53. One partner, or tenant in common, cannot maintain replevin against another; but under particular circumstances a single partner may do so against a third person. *Anderson v. Stewart*, 108 Md. 340, 349.

The person in possession is the only proper defendant in replevin but the joinder of another not in possession is not necessarily fatal, as plaintiff is entitled under Code 1911, Art 75, secs. 39, 40, to strike out the misjoined defendant. *Herzberg v. Sachse*, 60 Md. 426. Replevin by a surviving partner for firm property should not be brought against the administrator of the deceased partner in his representative but in his individual capacity. *Smith v. Wood*, 40 Md. 293.

<sup>5</sup> Property taken in execution, whether wrongfully or not, is *in custodia legis* and cannot be replevied by the owner, although he is a stranger to the execution. *Ginsberg v. Pohl*, 35 Md. 505; *Balto. Ry. Co. v. Kiaff*, 103 Md. 357.